
Teaching and Learning of Procedural Law Courses: An Overview of the best practice in Malaysia

^{i*}Izawati Wook, ⁱArif Fahmi Md Yusof, ⁱNorfadhilah Mohamad Ali, ⁱIntan Shafinaz Mohammadi

ⁱFaculty of Syariah and Law, Universiti Sains Islam Malaysia, Nilai

*(Corresponding author) email: izawati@usim.edu.my

ABSTRACT

Procedural law courses are important components in legal education in all law schools in Malaysia. The courses include Civil Procedure, Criminal Procedure, Evidence as well as a more specific courses such as Bankruptcy and Winding-up. These are taught as compulsory courses in upper years in which students have already completed substantive areas of law. In law schools that include Syariah law (Islamic law) as part of their curriculum, Syariah procedural courses both for criminal and civil proceedings are also taught. Similar to many other professional courses, teaching and learning professional skills require special approach different from traditional approach of lecture and tutorial which centres on lecture-based instruction in classroom. On the other hand, a common critic was that local law graduates are in need of improvement in legal skills including those that aimed to be instilled in procedural law courses. In addition, studies on the aspects of teaching and learning procedural law courses have been rather limited especially in Malaysia. This paper explores the best practice in teaching procedural law courses by reviewing the existing literature relevant to the subject matter and finding from a focus group discussion involving selected law teachers in teaching procedural law courses in some law schools in Malaysia. This is significant to contribute towards improvement of teaching and learning of the procedural law courses in law schools.

Introduction

With the increasing number of law graduates in the market, the expectation from prospective employers is much higher compared to previous decades. The law schools are now challenged to conform to the 'new reality', that is to meet the demand of the market for 'practice aware' law graduates (Finkelstein 2015). Law graduates are expected to have acquired more practical skills, greater knowledge about legal practice and require less training to be effective legal professionals. In other words, the contemporary development in legal education sees the trend that law schools needs and can do more to prepare students for practice (Fliyd, Griffin, and Sneddon 2011).

A common critic is that local law graduates are in need of improvement in legal skills. Law school programs are often criticised as too academic, too theoretical and not practical enough to prepare students for legal practice (Nor et al. 2011). In the same token, a recent study on the directions of legal education in Malaysia commissioned by the Ministry of Higher Education suggested that among the skills lacking among the law students are thinking across different areas of law; arguing positions orally, mediating disputes and creative thinking in finding legal solutions (Kementerian Pengajian Malaysia 2013). From law practitioners' perspective, as reported in the study, among the most important skills required for the law students are knowledge of court procedures and drafting legal documents which are part of procedural law content.

Therefore, it is suggested that the law schools need to review their current methods of teaching and learning to adapt to the needs of the profession. There should be greater emphasis in the inculcation of skills rather than sole infusion of knowledge as is the current emphasis in local law schools (Kementerian Pengajian Malaysia 2013). It is essential that graduates to be introduced to practical skills and to understand how doctrine relates to practice (Finkelstein 2015, Fliyd, Griffin, and Sneddon 2011). The goal should be to provide sufficient knowledge of applied doctrines and practical contexts so that the graduate lawyers have a basis to understand the context of practicing law (Finkelstein 2015).

Apart from the practical skills, analytical skills such as case law and statutory analysis as well as the evaluation of legal doctrinal issues, are also critical components of the basic procedural courses (Fliyd, Griffin, and Sneddon 2011).

Procedural law courses are an important component in legal education in all law schools in Malaysia. The courses include civil procedure, criminal procedure, evidence as well as a more specific courses such as bankruptcy and winding-up proceedings. These courses involve an integration of substantive rules, which include principles and doctrines, and the procedural rules. They essentially encompass the process of applying both aspects of the substantive and procedural rules. Therefore these courses are the key aspects of the works pursued in the legal profession. They are taught as compulsory courses in upper years where students will have already covered substantive areas of law. In schools that include Syariah law as part of their curriculum, Syariah procedural courses both for criminal and civil proceedings are also taught.

This paper provides an overview of the best practice in teaching procedural law courses. It explores the existing literature relevant to the subject matter, which are mainly from other jurisdictions such as the US and Australia. The research also investigates the approach taken by selected law teachers in teaching procedural law courses in some law schools in Malaysia. For this purpose, a roundtable discussion was conducted on 3 November 2016 at the Faculty of Syariah and Law, Universiti Sains Islam Malaysia (USIM). It took the approach of focus group. This method provides an insight into how people think and allows for a deeper understanding of a phenomenon being studied. Group interaction between members of the target population during focus groups may encourage participants to make connections to various concepts through the discussions (Nagle and Williams). The main topic of the discussion centred on the approach taken by the individual teachers in teaching the procedural courses, discussion on their experience, suggestions for the best practice and challenges that they faced in teaching and learning of the procedural courses.

The roundtable session was attended by 10 law teachers from five law schools in Malaysia. They are teachers from Universiti Kebangsaan Malaysia (UKM), Universiti Islam Antarabangsa Malaysia (UIAM), Universiti Multimedia (MMU), Universiti Utara Malaysia (UUM) and Universiti Sains Islam Malaysia (USIM). To initiate discussion, four teachers delivered talk on their opinion and experience in teaching procedural courses. Three of them are experienced law practitioners who are teaching various procedural courses on a part time basis. Another one is a full time senior law teacher. This paper provides the main findings from both the review of the literature and the roundtable discussion. This may contribute towards improvement of teaching and learning of the procedural law courses in law schools.

The best practice in teaching and learning procedural law courses: an overview

As mentioned earlier, the main objective in teaching and learning courses such as procedural laws is the development of skills rather than imparting the substance. There are several aspects that are found as significant in the approach of teaching to meet the objective. As would be seen, various methods and approaches discussed are essential to be taken in combination by the law teachers with cooperation of the faculty.

Experiential learning or learning by doing

It is a consensus among the law teachers participated in the roundtable session conducted that the main method effective in teaching the procedural law courses is by incorporating the experiential learning exercise as a major learning activity. In experiential learning approach, students are learning by actually doing the necessary aspects i.e. the main processes involved in a court proceeding. The process ranges from preliminary steps necessary before initiating the court proceeding, the court proceeding itself as well as the process involved in post-court proceeding.

For civil proceeding, the preliminary steps involve process in collecting information, writing letters and legal opinion, and drafting cause papers or pleading documents. The process

conducted during proceeding include filing, service of documents, exchanges of pleadings, as well as preparation for and conduct of hearing, trial and submission. Post-court proceeding should also be included as this necessary part has often not been given adequate attention. On the other hand, criminal proceeding requires less document preparation but more concentration on the skills for preparation for trial, the conduct of trial and submission process. Both types of proceedings require the ability to apply the relevant substantive laws in practice.

Learning by doing, or on the part of the teachers, teaching by doing, as suggested by the law teachers participated in the roundtable session, may overcome difficulty that the students faced to relate to many issues in civil procedure. This is because students are learning about the complex process without having seen it in action. Until students have to make the discretionary litigation decisions themselves, as pointed out by Bamford et al. (2013), they will not understand the complexity of the rules of procedure and why the rules say what they say.

Experience by the law teachers who adopt this method, as reported in the roundtable session shows that students are often found as 'excited' with the new method of learning on how to engage in dispute resolution and to play an active role in resolving hypothetical cases. This is positive in that it engages the students' interest and facilitates understanding of the complex content of the procedural courses.

Certain facilities to accommodate the experiential teaching and learning method is an advantage. In law schools at UiTM and UKM for instance, there are special facilities for final year law students to conduct themselves as real professionals specifically in litigation areas. These facilities include moot courts and special rooms designed to replicate the real law offices. Apart from attending classes, students will work in teams in the offices to complete the assigned works. More recently, other law schools including USIM and Universiti Sultan Zainal Abidin (UNISZA) also provide the same facilities for litigation exercises. These kind

of facilities provides atmosphere that allows students to visualise the real court proceeding in action.

Besides, final year law students in UiTM, UKM and USIM as well are required to dress themselves appropriate to the professions and to be present in the office during normal office hours. With this, the students familiarise themselves with etiquette, disciplines and conduct of the professions.

Individual initiative of the law teachers

Generally, from the discussion made, the approach taken in teaching of the procedural laws is based on the initiative of the individual teachers rather than as policy of the schools. In the last decade, most of the teachers took the approach of traditional form of lecture and tutorial. They concentrate heavily on the content and interpretation of the rules of procedure. This includes close reading of the relevant statutes and cases that interpret the rules.

While there are still many teachers continue the same teaching approach, as observed by the participants of the roundtable session, there are growing number of teachers who have moved to the experiential learning approach by including some elements of doing in classes such as drafting summonses, pleadings and affidavits. Students are also given assignments to handle simulated cases and to engage in interlocutory hearings, and negotiations with hypothetical clients. This, as pointed out as by Knutsen et al. (2013), is a more pragmatic approach which at the same time work towards imparting litigation skills.

Using simulated case

It was also observed that there are only a few law teachers who are known to integrate the whole topics in the procedural courses with a particular simulated case by using the experiential learning exercises. In other words, a simulated case is used to organize syllabi for the whole semester. The simulated case, or a storyline, may be sourced either from a reported case, relevant novels, or even movies and drama series (Gershowitz, 2014). This approach may address the issue of students' lack of exposure to litigation as students work through a real case, civil or criminal, from beginning to end. Students start with the complaint, move through

discovery, to trial, and then to the appeal. Working through a case file provides context for each of the procedural steps (Jones 2017; Bamford et al. 2013; Tidmarsh and E. 2013).

Hypotheticals or problems used to create dialogues that draw on actual cases are even more engaging. This allows students to see the discussion material in the context of how lawyers actually work and thereby, learn effectively when legal doctrine, its context, and how doctrine actually works in practice are integrated (Oppenheimer 2016). In addition, by learning rules through exposure to the civil procedure system as a whole system, students develop confidence about where to find answers in the future (Bamford et al. 2013).

However, a whole semester simulation can be overly time-consuming for both teachers and the students. It requires good planning and completed resources. Nevertheless, the benefits that it delivers may outweigh the challenges and difficulties of this approach. Nowadays, there are many resources available to be used by law teachers (Oppenheimer 2016; Jones 2017; Tidmarsh and E. 2013), although most of them are from the United States and therefore its suitability to the local legal context should be considered. In view of that, it would be valuable for local law teachers to dedicate effort to develop the resource materials that suits local legal system for use in teaching and learning.

Lecture and tutorial set-up

Most law schools rely on lectures and small-group teaching methods. Commonly the lecture set-up comprises a large number of students. These students would be divided to several small groups of approximately 10-25 students. There are usually two hours allocated for lecture and one hour is intended for small tutorial groups. This arrangement however makes it difficult to teach procedural materials in a more engaging way. This approach is therefore teachers oriented rather than the students'.

On the other hand, experiential learning requires more active learning by the students and the lecture session should be reduced to a brief introduction to the materials to spark discussion among

the students. Therefore, more time should be allocated for small group exercises to accommodate the need of the experiential learning exercises. However this arrangement is more expensive to deliver as it requires more teachers' time and resources.

Drafting cause papers or pleadings

Civil court proceedings especially involve numerous documents preparation. Many agree that skills necessary to draft pleadings, prepare and file motions and manage the discovery process are essential for law students. The basis of these skills are the legal writing skills which begin from earlier years in law schools when students learn other substantive law courses. These are essential as they provide a platform for students to examine different subject matters in civil procedure in a participatory fashion (Fliyd, Griffin, and Sneddon 2011).

For civil procedure, writing exercises should centre on two fundamental goals: first, doctrinal and rule application and second, skill development (Fliyd, Griffin, and Sneddon 2011). These exercises provide an opportunity for students to experience application of civil procedure rules and doctrines in concentrated law-practice scenarios not ordinarily explored via the traditional case law review or problem-solving exercises.

The drafting exercise requires students to act collectively and within specific time limitations. They are permitted to use research sources that would be available to practising lawyers. As part of the exercise, students are intentionally not given a mock complaint to review as they prepare their answer but are advised of allegations raised in the complaint and the corresponding paragraph. As a result, students are forced to draft the caption as well as substantive responses to the allegations. This support the skill-introduction goal of the writing exercise (Fliyd, Griffin, and Sneddon 2011).

Drafting exercises have been a practice in many law schools in Malaysia although to a varying degrees. In some law schools, such as UITM and UKM, drafting exercises have been an important components for learning. Students are given a brief instructions on basic introduction and materials. Using inquiry based learning, students are given a set of issues for them to prepare documents

by reference to the relevant materials. Students are divided into small classes avoiding from traditional lecture-tutorial set-up. In contrast, in many other law schools, procedural courses are still tight to the lecture-tutorial arrangement in which learning are mainly lecture based in nature.

Classroom writing exercises provide an excellent opportunity to survey students' application of analytical reasoning skills regarding civil procedure rules and doctrines. Too often the only way available to assess students' understanding or misunderstanding of civil procedure subject matter is the final exam paper. Therefore, targeted writing exercises can provide teaching faculty valuable insight as to whether a particular teaching methodology is effective or whether certain adjustments should be made in the classroom to improve students' comprehension (Fliyd, Griffin, and Sneddon 2011).

Fliyd, Griffin, and Sneddon (2011) also give several examples on the relevant questions for the students to do their writing exercise in the classroom. One of the exercises provides a chance for students to consider the application of various discovery devices in the context of an emerging factual scenario. For example, the exercise prompts students to critically examine civil procedure rules, such as rules which govern the production of documents as well as electronically-stored information and protective orders.

According to Bamford et al. (2013), the key to legal drafting assignments is to place less emphasis on technical drafting skill and more emphasis on how lawyers use professional discretion strategically in writing advocacy-based documents for their clients, while still being constrained by the various customs within the world of form-based paperwork. Students can draft a claim, a defence, a list for documentary discovery, or a motion record. Instructors can provide them with one basic precedent from which to work, and encourage them to seek out others to use as sample.

However, the challenge to adopt this writing exercises in teaching methodology in law school is the limited amount of time compared to the complexity of courses. This is shared by many law teachers who attended the roundtable discussion. A teacher

suggested to reduce the number of courses by focusing on more important and basic courses. Other courses, which actually apply the same skills may be dropped from the syllabus. The subject of bankruptcy proceeding for example, in term of skills and process, is covered by another more general subject such as civil procedure. The teacher also suggested for a review of the current module which he felt extensive in number and coverage that may affect students' focus.

To deal with this as well, Fliyd, Griffin, and Sneddon 2011 suggested for greater attention on some more important topics compared to other areas. Subject areas such as personal jurisdiction, pleadings, joinder, discovery and pre-trial and post-trial practice are time-consuming that require special attention. Meanwhile, other subjects such as removal, multi-party litigation, appeals and preclusion often are given less time for coverage. In addition, some topics which cannot be given sufficient time for in-class coverage, such as concepts and doctrines, may be covered by giving writing exercises.

Another difficulty for the students to understand court process and subject matter is lack of experience. In many situations, students are found unable to digest or appreciate many aspects of court matters. Reading of daily news for example may help students to understand the context.

Teamwork and horizontal collaborative exercises

Andragogy that replicates the practice of law through collaborative exercises such as teamwork, collaboration, and creative problem solving may enhance learning experience (Finkelstein 2015). Working in a team allows students to learn from each other to address practical problem (Finkelstein 2015). In teaching procedural courses, the approach is especially essential. Many law teachers adopt this approach by dividing classes to replicate the process of working with opposing counsel. The law schools in UITM and UKM, and recently USIM, have adopted law firm's simulation system to allow students to replicate the legal practice throughout the semester.

Assessment

In most law schools, procedural courses use written examination as a primary assessment activity. However, from personal observation by the authors, there is a move towards allocating less marks for written examination but greater part for exercises conducted throughout the semester. As the primary objective of the courses intended, assessment should focus on the skills aimed to be enhanced. A law teacher from UKM suggested that the assessment conducted in the school is structured according to the range of skills, legal and soft skills.

In addition, giving feedback is a critical component in the law classroom (Flyyd, Griffin, and Sneddon 2011). Feedback can be individualized, written reactions on individual assignment. A critical skill for lifelong learners is self-reflection and self-assessment.

Other than that, peer review may also foster a cooperative and collaborative classroom environment. Peer review allows students to receive individualized feedback and observe another approach to the same assignment.

Observation

Observation is also an effective learning tool. It may be in the form of in-class demonstration works such as using real legal documents as sample. Other great examples are demonstration of oral submission and mock trial. Watching relevant movies also appeals to students' interest.

Outside classroom activities, on the other hand enrich students learning. The teachers may encourage students to conduct visits, individuals or in groups, to various related institutions. Visit to a court to observe hearing and trial, an interview with a lawyer, and a study of a court file will sharpen the understanding of the subject at hand.

In almost all of the law schools in Malaysia, these outside classroom activities are incorporated in a subject known as

industrial training, although it can be part of particular courses' activities. Law school in USIM for instance requires students to undergo two sessions of two-months long period of industrial training in two different legal related institutions. These training which is compulsory for second and third year law students provide a basis for understanding of the law in action, thus making the learning of the procedural courses less complex.

Legal clinics

Legal clinic or also termed as clinical legal education (CLE) is an integral part of training law students in practical skills. It is a law school program, usually directed by a law professor, providing hands-on legal experience to law school students and services to public at large. Clinical learning allows students to handle real cases. Apart from real cases, students can be introduced to new and challenging "real life" issues, through simulations and other exercises, without the constraints of an actual client representation (Finkelstein 2015).

In some jurisdictions, such as the United States (US) and the Philippines, CLE also serves to provide access to justice for unrepresented clients. However, due to certain legal impediments in Malaysia, the CLE does not work in similar fashion. On the other hand, there are many activities undertaken by undergraduates for a Bachelor of Laws program in Malaysian universities instilled with CLE elements mostly through simulated cases (Nor et al. 2011). Students can be allowed to explore alternatives without the risks or constraints of an actual client representation. Together, the clinical experience and the experiential learning environment compliments each other and present the full scope of pedagogical opportunities (Finkelstein 2015).

Collaboration with the law professionals

Another key aspect for success in teaching procedural law subject is collaboration with the legal professional (Finkelstein 2015; Bamford et al. 2013). At vertical level, Finkelstein 2015 suggested for involvement of practitioners working with full-time faculty in developing the curriculum especially aspects that focus on the

practical skills components of traditional doctrinal classes. Practitioner involvement is very important as it brings contemporary, real-world perspectives that give the subject credibility in the eyes of students, admission authorities, and the professional community (Bamford et al. 2013).

It has been a practice in many law schools in Malaysia to have law practitioners teaching on a part time basis. There are also full time law teachers who have previous legal experience. There are also law practitioners invited to develop materials to guide on the preparation of course outlines, focus learning objectives, create syllabi, and evaluate student.

Conclusion

As discussed above, the emphasis for the development of the essential skills for law graduates requires a well-planned teaching methodologies. The broad array of pedagogical approaches which integrate the teaching and learning theory, doctrinal and practical aspects of law with context-based instruction using simulated cases, teamwork and various other activities will enhance the prospect of producing the law graduates that meet the contemporary challenges. Other aspects such as collaboration with law practitioners as well as the greater use of legal clinic will facilitates the students' retention and learning experience.

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